179 (2)

No. 10-508

In the Supreme Court of the United States

WILLIAM COZZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
THOMAS E. PEREZ
Assistant Attorney General
JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's Fifth Amendment right against compelled self-incrimination was violated when the federal investigation leading to his indictment began after a third party, who had read petitioner's immunized statements, asked federal investigators whether they had initiated an investigation but did not disclose anything from the statements.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Garrity v. *New Jersey*, 385 U.S. 493 (1967) 4, 6
Kastigar v. *United States*, 406 U.S. 441 (1972) ... 4, 6, 7, 13
United States v. *Bolton*, 977 F.2d 1196 (7th Cir. 1992) 8, 10
United States v. *Byrd*, 765 F.2d 1524 (11th Cir. 1985) 8, 10
United States v. *First W. State Bank*, 491 F.2d 780 (8th Cir.), cert. denied, 419 U.S. 825 (1974) 7, 10
United States v. *Hubbell*, 530 U.S. 27 (2000) 11, 12
United States v. *Mariani*, 851 F.2d 595 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989) 8, 10
United States v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973) 5, 7, 9, 10
United States v. *McGuire*, 45 F.3d 1177, cert. denied, 515 U.S. 1132 (1995) 7
United States v. *Pantone*, 634 F.2d 716 (3d Cir. 1980) 7, 10
United States v. *Schmidgall*, 25 F.3d 1523 (11th Cir. 1994) 8, 10
United States v. *Semkiw*, 712 F.2d 891 (3d Cir. 1983) 7, 10

Cases—Continued: Page

United States v. *Serrano*, 870 F.2d 1 (1st Cir. 1989) . . . 8, 10
United States v. *Velasco*, 953 F.2d 1467 (7th Cir. 1992) 8, 10

Constitution and statutes:

U.S. Const.:
Amend. V 3, 5, 6, 7
Amend. XIV 6
18 U.S.C. 242 3
18 U.S.C. 6002 6

Miscellaneous:

Jack Lewis et al., *The Gun Digest Book of Assault Weapons* (7th ed. 2007) 2

In the Supreme Court of the United States

No. 10-508

WILLIAM COZZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 613 F.3d 725. The opinion of the district court (Pet. App. 33-46) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2010. The petition for a writ of certiorari was filed on October 13, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a conditional guilty plea to one count of violating 18 U.S.C. 242, deprivation of rights under color of law. He was sentenced to 40 months of imprisonment. The court of appeals affirmed. Pet. App. 1-21.

1. In August 2005, petitioner, a Chicago police officer, repeatedly struck an arrestee in the head and face with a "sap" after petitioner had handcuffed the arrestee to a wheelchair in a hospital emergency room.[1] A hospital security camera taped the incident, and the hospital contacted the Chicago Police Department's Office of Professional Standards (OPS) to report it. Pet. App. 1-3, 34-35.

OPS promptly investigated. Within a month, OPS investigators interviewed the victim and several witnesses and obtained a copy of the video and 911 calls related to the incident. Pet. App. 34-35. Subsequently, on September 14, 20, and 21, 2005, OPS interviewed petitioner. Petitioner "was first given administrative rights, which compelled him to make a statement or lose his job, but which also guaranteed that his statements could not be used against him in any future criminal proceedings." *Id.* at 3. In October 2005, OPS released a report recommending that petitioner be terminated. *Id.* at 3, 35.

The Cook County State's Attorney's office also investigated the incident. In December 2005, petitioner was charged with aggravated felony battery and official misconduct. In May 2007, petitioner pleaded guilty to one count of misdemeanor battery and was sentenced to 18 months of probation. Pet. App. 3, 35.

In April 2006, the Chicago police superintendent filed charges against petitioner with the Chicago Police

---

[1] "Although the record does not contain a description of the actual weapon that [petitioner] used, a sap is generally described as 'a leather-covered flat or round piece of lead with a spring handle, although it could contain lead shot rather than a solid piece of metal.'" Pet. App. 1 n.1 (quoting Jack Lewis et al., *The Gun Digest Book of Assault Weapons* 42 (7th ed. 2007)).

Board, seeking to have petitioner terminated. In October 2007, the Police Board decided to suspend petitioner for two years rather than terminate him. Pet. App. 3.

2. In January 2008, former Federal Bureau of Investigation (FBI) agent Jodi Weis, who was scheduled to become the new Chicago police superintendent on February 1, 2008, was asked by the press about petitioner. Weis responded that he was unhappy with the Chicago Police Board's decision and promised to review the case. Pet. App. 4, 36.

Subsequently, in January 2008, Weis sent two emails to an agent in the FBI's Chicago field office. Weis asked whether the FBI had investigated petitioner for a civil rights violation, noted that the former police superintendent had tried to fire petitioner, and stated that petitioner had "falsified his statement." Weis also attached a video clip of the incident that was recorded by the hospital security camera. Pet. App. 4, 36. The emails did not disclose petitioner's protected statements or say what part had been "falsified." *Id.* at 14.

After receiving Weis's emails, the FBI began an investigation. The FBI obtained the files compiled by OPS and the Cook County State's Attorney's office. Petitioner's immunized statements, however, were redacted from the files, so that none of the federal prosecutors saw or reviewed petitioner's protected statements. The immunized statements were also removed from the OPS files that were turned over to the grand jury. Pet. App. 4, 36-37.

3. In April 2008, a federal grand jury indicted petitioner on one count of violating 18 U.S.C. 242, deprivation of rights under color of law. Petitioner filed a motion to dismiss the indictment, arguing that the government had improperly used his immunized statements in

violation of the Fifth Amendment. The district court denied the motion, rejecting the argument that Weis's exposure to petitioner's compelled statements "contaminated" the federal investigation and prosecution. Pet App. 37; see generally *id.* at 33-46. The district court found that Weis "was not part of the team within either the FBI or the U.S. attorney's office who investigated [petitioner's] conduct or decided to pursue his prosecution," and that "[petitioner's] statements were redacted from the materials reviewed by the U.S. Attorneys prosecuting [petitioner]." *Id.* at 39. The district court concluded that Weis's review of petitioner's statements therefore "could not have had even a 'tangential influence' on thought processes of the prosecutors." *Ibid.* (citation omitted).

Petitioner entered a conditional guilty plea, reserving his right to appeal the district court's denial of his motion to dismiss the indictment, and the district court sentenced petitioner to 40 months of imprisonment. Pet. App. 4-5.

4. The court of appeals affirmed. Pet. App. 1-21. The court concluded that Weis's review of petitioner's protected statements and subsequent "tip" to the FBI did not constitute improper nonevidentiary, or "derivative," use of petitioner's statements under this Court's decisions in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and *Kastigar* v. *United States*, 406 U.S. 441 (1972).[2] The court of appeals recognized that some courts have read

[2] The court of appeals assumed that Weis had read the protected statements before sending the emails to the FBI, noting that the United States did not submit an affidavit from Weis explaining what he did and did not read. Pet. App. 10. The court of appeals also assumed that Weis was motivated to email the FBI because of what the protected statements contained. *Ibid.*

Kastigar's prohibition on the evidentiary and nonevidentiary use of compelled statements to preclude "not only the introduction of compelled testimony into evidence, but also 'assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.'" Pet. App. 7 (quoting *United States* v. *McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973)). The court also observed that it has joined other courts of appeals in concluding that in some instances the "tangential influence" of compelled statements on a prosecution does not run afoul of the Fifth Amendment right articulated in *Kastigar*. *Id.* at 7-8.

The court noted, however, that the difference between these approaches was not at issue in this case because "[w]hen framed properly, it is clear that [petitioner's] statements could not have had even a tangential influence on the federal prosecutors." Pet. App. 14. The court noted that Weis "did not tell his former colleague at the FBI what [petitioner's] statements contained"; the "FBI had to start its investigation into [petitioner] from scratch"; Weis's emails were "devoid of any details about [petitioner's] protected statements"; and the emails "provided federal authorities with no evidentiary leads or other information that they could use to focus their investigation." *Ibid.* For these reasons, "Weis's tip is at least one step too far removed from the actual federal investigation and prosecution to justify overturning [petitioner's] conviction." *Id.* at 16.

ARGUMENT

Petitioner reasserts his claim (Pet. 26-30) that he was convicted in violation of his Fifth Amendment right against self-incrimination because the federal investiga-

tion began after a tip from a third party who had read his immunized statements. The court of appeals correctly rejected this claim because no one on the prosecution team read petitioner's statements or was told of their content. For the same reason, this case does not implicate the circuit conflict petitioner describes because, unlike the nonevidentiary use decisions from other courts of appeals on which petitioner relies, this case involves only third-party knowledge of immunized statements, not knowledge of anyone on the prosecution team. Further review is not warranted.

1. The Fifth Amendment privilege against compelled self-incrimination, applicable to the states through the Fourteenth Amendment, provides that a person cannot be compelled to testify if his testimony would incriminate him. In *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), the Court held that this protection "against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Id.* at 500. Subsequently, in *Kastigar* v. *United States*, 406 U.S. 441 (1972), the Court held that the immunity from the use of compelled testimony includes both "use" and "derivative use" immunity, *i.e.*, it "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.* at 453 (addressing immunity granted under 18 U.S.C. 6002, which is coextensive with the immunity granted by the Fifth Amendment).

The Court in *Kastigar* explained, however, that the immunity afforded compelled statements is not transactional immunity and therefore is not a bar to prosecution for the offense to which the compelled statements

relate. 406 U.S. at 460-462. Once the defendant has demonstrated that he has given immunized statements, the government has the burden of showing that it had a legitimate source for its evidence, "independent of the compelled testimony." *Id.* at 460.

2. a. The courts of appeals have evaluated nonevidentiary use of immunized statements by prosecutors and investigators in somewhat different ways. The Eighth Circuit has suggested that all such nonevidentiary use violates the Fifth Amendment, a reading the Third Circuit has cited with approval. See *United States* v. *McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (where the United States Attorney read three volumes of immunized state grand jury testimony, government could not meet its burden of showing that it did not make direct or indirect use of the testimony; immunized testimony may have been used in "focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy");[3] *United States* v. *First W. State Bank*, 491 F.2d 780 (8th Cir.), cert. denied, 419 U.S. 825 (1974); *United States* v. *Semkiw*, 712 F.2d 891 (3d Cir. 1983) (following *McDaniel*); *United States* v. *Pantone*, 634 F.2d 716, 720-721 (3d Cir. 1980).

By contrast, the court of appeals below has joined others in adopting "a more measured approach," permitting the use of immunized statements that have a mere

[3] The Eighth Circuit has subsequently explained that "*McDaniel* is a case limited to its 'unusual circumstances,'" and "[t]he determination of a *McDaniel* violation necessarily turns on the facts of each case and * * * whether the immunized testimony was used by the prosecutor exposed to it." *United States* v. *McGuire*, 45 F.3d 1177, 1183 (citation omitted), cert. denied, 515 U.S. 1132 (1995).

"tangential influence" on the federal investigation and prosecution, such as the prosecutor's thought process in preparing for trial. Pet. App. 7; see *United States* v. *Schmidgall*, 25 F.3d 1523, 1529 (11th Cir. 1994) (adopting an "'evidentiary' interpretation of *Kastigar*," focusing "on the direct and indirect evidentiary uses of immunized testimony, rather [than] on [nonevidentiary] matters such as the exercise of prosecutorial discretion"); *United States* v. *Bolton*, 977 F.2d 1196 (7th Cir. 1992); *United States* v. *Velasco*, 953 F.2d 1467, 1474 (7th Cir. 1992) ("[T]he mere tangential influence that privileged information may have on the prosecutor's thought process in preparing for trial is not an impermissible 'use' of that information."); *United States* v. *Serrano*, 870 F.2d 1, 17 (1st Cir. 1989) (rejecting notion "that all nonevidentiary use necessarily violates the Fifth Amendment"); *United States* v. *Mariani*, 851 F.2d 595, 600 (2d Cir. 1988) (declining to follow *McDaniel* to the extent it bars prosecution based on tangential influence that privileged information may have had on the prosecutor's thought process), cert. denied, 490 U.S. 1011 (1989); *United States* v. *Byrd*, 765 F.2d 1524, 1530 (11th Cir. 1985).

b. Although petitioner asserts (Pet. 17-25) that the Court should grant his petition to resolve that conflict, it is not presented here. The court of appeals did not rely on its prior cases holding that "the mere tangential influence that privileged information may have on the prosecutor's thought process in preparing for trial is not an impermissible 'use' of that information." Pet. App. 7 (quoting *Velasco*, 953 F.2d at 1474). Instead, the court concluded that petitioner's statements "could not have had even a tangential influence on the federal prosecutors." *Id.* at 14. This was so, the court explained, be-

cause Weis never told federal investigators or prosecutors "what [petitioner's] statements contained," so those statements could not have influenced their thought process. *Ibid.*[4] "[T]he chain of evidence was cut off between Weis and federal investigators because Weis did not communicate any of the contents of the statements in his email." *Id.* at 15-16. Moreover, "[n]one of the federal prosecutors saw or reviewed [petitioner's] immunized statements, and his protected statements were removed from the OPS files that were turned over to the federal grand jury." *Id.* at 4; see *id.* at 16-17 ("[T]here is a meaningful difference between Weis telling the FBI that it ought to consider investigating [petitioner] and Weis telling the FBI the substance of [petitioner's] protected statements.").

By contrast, in *McDaniel* the United States Attorney admittedly read the defendant's state grand jury testimony, in which the defendant "fully confessed his misdeeds," prior to the indictment. 482 F.2d at 311. Therefore, that case addressed whether a prosecutor's exposure to immunized testimony created an "insurmountable task" for the government in meeting its burden of proof under *Kastigar*. *Ibid.* Although the United States Attorney asserted that he did not use the immunized testimony in any form, the court could not "escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." *Id.* at 312. Therefore, the court found that, under the "unusual circumstances" of the

---

[4] Weis did say that petitioner had "falsified" his statements, but this characterization of petitioner's statements "by itself," without disclosing their contents, is not "enough to impute improper use of the statement to prosecutorial authorities." Pet. App. 14.

case, the government could not meet its burden of establishing that it did not use the immunized statements to convict the defendant. *Ibid.* Other court of appeals decisions cited by petitioner—both those barring the non-evidentiary use of immunized statements, and those permitting such use in certain circumstances—similarly involve federal investigators or prosecutors who were exposed, or may have been exposed, to the compelled statements.[5]

Petitioner's novel claim, which involves "use" of an immunized statement by someone not part of the investigative or prosecution team, stands apart from all of those discussed by the courts of appeals. Indeed, before the court of appeals, petitioner failed to bring "to [the court's] attention a single case where a non-prosecutor's use of a compelled statement, by itself, was held to be a

---

[5] See, *e.g.*, *First W. State Bank*, 491 F.2d at 787-788 (remanding for a determination whether any information used in prosecution derived from immunized statements); *Semkiw*, 712 F.2d at 893 (addressing significance of lead government counsel's access to immunized testimony); *Pantone*, 634 F.2d at 718 (defendant moved to disqualify United States Attorney who conducted grand jury proceeding at which defendant testified under grant of immunity); *Velasco*, 953 F.2d at 1474 (addressing argument that prosecutor used immunized proffer to shape trial strategy); *Bolton*, 977 F.2d at 1199 (indictment not tainted by prior compelled testimony where new prosecutors handled the case); *Mariani*, 851 F.2d at 601 (government established that its evidence came from legitimate independent sources, and alleged non-evidentiary uses of immunized testimony were not impermissible); *Schmidgall*, 25 F.3d at 1527-1528 (federal investigator reviewed notes of defendant's immunized interview); *Byrd*, 765 F.2d at 1526 (transcripts of immunized testimony given to lead FBI agent on case and United States Attorney's Office); *Serrano*, 870 F.2d at 13-17 (although FBI agent viewed immunized testimony on television, and transcript was given to prosecutor, government established that the indictment was not based on immunized testimony or its fruits).

violation of the defendant's Fifth Amendment privilege." Pet. App. 12; see *ibid.* (likewise noting that "the government has not cited any cases where a nonprosecutor's use of a compelled statement was held not to be a violation of the defendant's Fifth Amendment privilege").

3. Petitioner also errs in contending that the decision below is inconsistent with this Court's decision in *United States* v. *Hubbell*, 530 U.S. 27 (2000). Pet. 11-12. In *Hubbell*, the government served a subpoena *duces tecum* on the defendant calling for the production of 11 categories of documents. The defendant objected, asserting his Fifth Amendment privilege, and the government granted him immunity "to the extent allowed by law." 530 U.S. at 31. The contents of the documents he produced led to the defendant's prosecution and conviction. This Court affirmed the dismissal of the indictment, concluding that the government made impermissible derivative use of the immunized act of producing the documents. The Court stated that "it is undeniable that providing a catalog of existing documents fitting within [the subpoena request] could provide a prosecutor with a lead to incriminating evidence, or a link in the chain of evidence needed to prosecute." *Id.* at 42 (internal quotation marks omitted). The Court found that the government could not show that it had prior knowledge "of either the existence or the whereabouts of the 13,120 pages of documents," or that the evidence used to obtain the indictment was derived from sources "wholly independent of the testimonial aspect of [the defendant's] immunized conduct in assembling and producing the documents." *Id.* at 45 (internal quotation marks omitted).

In *Hubbell*, therefore, unlike the instant case, federal prosecutors obtained and reviewed evidence derived

from the testimonial act of production and used that evidence to indict. Although the Court noted that the production of these documents was "the first step in a chain of evidence that led to th[e] prosecution," 530 U.S. at 42, the government also made "substantial use" of the incriminating documents "in the investigation that led to the indictment." *Id.* at 43 (internal quotation marks and citation omitted). By contrast, in the instant case the FBI received a tip that led to an investigation of a highly publicized incident, and the investigation started "from scratch." Pet. App. 14. The federal investigation and subsequent prosecution made no use—direct or tangential—of the prior *Garrity* statements.

4. Petitioner also contends that this case raises an important question of law about the scope of the Fifth Amendment privilege and the nonevidentiary use of immunized statements. Pet. 26-30. Petitioner argues that because the decision to prosecute "is directly traceable to Weis'[s] use of [p]etitioner's immunized statements," there was "derivative use" of the statements even if the prosecutors—who had no knowledge of the substance of the statements—were not influenced by them. Pet. 26-27. Petitioner further argues that the decision below effectively permits state officials to use defendants' immunized statements to hand the defendants to federal officials for prosecution. Pet. 28-29.

Petitioner's contentions again overlook Weis's failure to impart to the FBI the contents of petitioner's statement, and the fact that federal investigators and prosecutors were never made aware of any information contained in or derived from petitioner's compelled statements. Weis simply asked the FBI if it was going to investigate an incident of excessive force that was publicly known and subject to media attention. As the court

of appeals found, even assuming Weis's review of the immunized statements prompted him to email the FBI, "Weis's tip is at least one step too far removed from the actual federal investigation and prosecution" to implicate petitioner's Fifth Amendment rights. Pet. App. 16a. In these circumstances, petitioner's argument, if accepted, would come perilously close to granting transactional immunity for the protected statements, a result expressly rejected by this Court in *Kastigar*. 406 U.S. at 453.

5. Finally, this petition makes a poor vehicle for review of the self-incrimination question it claims to present. The record does not include petitioner's immunized statements themselves, nor any statement by Weis that he read them. The court of appeals merely "assume[d] for purposes of this appeal that Weis read the protected statements" and "even assume[d] that he was motivated to email his colleagues at the FBI because of what the protected statements contained." Pet. App. 10. The case thus comes to the Court bereft of factual context that could provide a meaningful backdrop to the Court's consideration of the legal issues.

Moreover, even assuming the statements "motivated" Weis to contact the FBI, Pet. App. 10, there is no suggestion that Weis suggested any investigatory leads to the agents, much less leads derived from the statements. Instead, he merely referred them to a case whose factual contours were already available from the video and from witness observations that were unquestionably distinct from petitioner's statements. Cf. *id.* at 41 ("[Petitioner's] compelled statements could not have been prosecutors' sole basis for seeking to indict him, especially given the abundance of evidence obtained *before* [petitioner's] compelled statements, not the least of

which is the security camera recording of the entire incident."). The alleged "use" of the statements here as a mere motivator by a third-party tipster is an atypical fact pattern that does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
THOMAS E. PEREZ
Assistant Attorney General
JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys

JANUARY 2011